Supreme Court, U.S.
FILED
051646 JUN 23 2006
OFFICE OF THE CLERK

No. 05-

In the
Supreme Court of the United States

JOHN H. MIDLEN, JR.,

Petitioner,

v.

BAR COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a disciplinary proceeding in the District of Columbia against an attorney admitted to practice there (and in this Court). As such, it was an "adversary proceeding[] of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551 (1968).

1. Whether in attorney disciplinary proceedings the District of Columbia Court of Appeals may rely on facts not found by the trier of fact, in view of *Blakely v. Washington*[1]?

2. Whether in governance of the legal profession, the District of Columbia--the functional equivalent of a state[2]--through its highest court, may empower clients to unilaterally abrogate their contracts of engagement with attorneys, given the constriction of Article I, Section 10 of the United States Constitution?

3. Whether due process requires that in interpreting rules of professional conduct, the District of Columbia Court of Appeals is bound to follow principles of statutory construction laid down by this Court?

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[1] ___ U.S. ___, 124 S.Ct. 2531 (2004).

[2] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

PARTIES TO THE PROCEEDING

Petitioner is John H. Midlen, Jr., an individual citizen and domiciliary of the State of Maryland.

Respondent is the Bar Counsel of the District of Columbia; currently serving in that post is Wallace E. Shipp, Jr.

RULE 29.6 STATEMENT

Petitioner is not a corporation.

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Appendix B—Order of the District of Columbia Court of Appeals Denying Petition for Rehearing En Banc, Dated March 30, 2006 ..... 26a

Petitioner John H. Midlen, Jr. respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported below as *In re John H. Midlen, Jr.* and appears at 885 A.2d 1280. It is reproduced at page 1a of the Appendix to this petition. The order of that court denying rehearing *en banc* is reproduced at App. 26a.

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 10, 2005. A timely filed petition for rehearing *en banc* was denied on March 30, 2006. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1257(a) and –(b).

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS

1. Pertinent provisions of the United States Constitution are:

Article I, Section 10, clause 1:

> No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendment V: "No person shall * * * be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Pertinent administrative provisions are Rules 1.15(b) and –(c) and 1.16(d) of the Rules of Professional Conduct of the District of Columbia,[1] as follows:

> Rule 1.15:
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.
> (c) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and

[1] They may also be found online at: http://www.dcbar.org/for%5Flawyers/ethics/legal%5Fethics/rules%5Fof%5Fprofessional%5Fconduct/

> severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).
>
> Rule 1.16(d):
> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....

The corresponding Model Rules of Professional Conduct of the American Bar Association are set out in the text or footnotes below and are printed in 2005 *Martindale-Hubbell Law Digest* at pp. ABA 22-23 and are published online at http://www.abanet.org/cpr/mrpc/mrpc_home.html.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner, John H. Midlen, Jr. (hereinafter Midlen), is an attorney licensed to practice in the District of Columbia and, *inter alia*, in this Court. When the judgment below

became effective, he was "suspended from the practice of law in the District of Columbia for eighteen months." App.25a. Following receipt in April 1998 of a complaint from one of Midlen's clients, Jimmy Swaggart Ministries (hereinafter JSM), this case began in December 2000 when Respondent, Bar Counsel for the District of Columbia (hereinafter Bar Counsel), lodged ten numbered charges against Midlen, each for an alleged infraction of a District of Columbia Rule of Professional Conduct. The triers of fact, Hearing Committee Number One, determined that Bar Counsel had abandoned or failed to prove all charges save one,[2] as to which it recommended an informal admonition. This case came to the District of Columbia Court of Appeals (hereinafter "Court" or "DCCA") on Midlen's exceptions from the Report and Recommendation of the Court's subordinate agency, the Board on Professional Responsibility ("BPR Report"). The Board overturned the Report and Recommendations of Hearing Committee Number One on Violations ("Violations Report") and its Recommendation on Sanction. On Bar Counsel's exceptions, the Board rejected both Committee Reports and concluded that Midlen had recklessly misappropriated client funds in violation of Rule 1.15(c). This Rule is patterned after and differs not in any material respect from the American Bar Association's corresponding Model Rule:

DC Rule 1.15(c)	ABA Model Rule 1.15(e)[3]
(c) When in the course of	(e) When in the course of

[2] The Committee found that Midlen violated Rule 1.15(b) of the D.C. Rules of Professional Conduct in being *slow* to render an accounting to JSM.

[3] 2005 *Martindale-Hubbell Law Digest* at p. ABA-22

representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).	representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer [until] the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Continuing, the Board found that Midlen had delayed rendering an accounting; and that he had acted dishonestly when he signed a settlement agreement Addendum, which, the Board found, was executed contrary to the client's instruction—with which the Hearing Committee specifically

found Midlen had *not* been charged[4]--and then kept secret from the client; and that he was too slow in turning over files to successor counsel. The Board recommended Midlen's disbarment. On appeal, the Court held that Midlen had negligently, but not recklessly or dishonestly, misappropriated JSM's funds, and it agreed with the Board that Midlen was late with the accounting, had signed the Addendum dishonestly, and was too slow in turning over files. As noted above, it rejected its Board's recommended ultimate sanction.

The DCCA, for at least a decade, has interpreted Rule 1.15(c) to mean that when an attorney and client are engaged in a fee dispute, the attorney may not deduct his disputed fees from funds held in escrow unless and until the fee dispute is resolved.[5] Not only does Midlen not contest that interpretation, Midlen understood it and had early on informed JSM's general counsel of that principle.[6] But the

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[4] Violations Report at 39.

[5] *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995): "The test, however, is not whether, when examining the circumstances objectively, one would conclude that respondent was legally entitled to the amount claimed; rather the test should be whether there was in fact a fee disagreement between the parties concerning respondent's entitlement to the amount withdrawn at the time of withdrawal. The rule is unambiguous: an attorney may not withdraw a portion of the deposited funds when the attorney's right to receive that portion is 'disputed' by the client."

[6] Cited in one of the Hearing Committee's findings was a letter from Midlen to JSM's general counsel in which Midlen laid out this principle as follows:

> . . . in no way could it be or have been construed that the amount ultimately charged for legal work was in contest.

DCCA had never, heretofore, held that a client's late-formed disputation of its counsel's underlying right to deduct undisputed fees from escrow pursuant to an engagement agreement unilaterally abrogated that attorney-client contract. The challenged opinion below "radically changed and extended the rule." *Holmes v. Gay*, __ U.S. __, 126 S.Ct. 1727, 1733 (2006).

In the case at bar, Midlen's representation of JSM commenced with an engagement agreement that permitted him to apply collected copyright royalties to any balance due for his legal fees. Initially, JSM concurred; then it sought to change the arrangement—which, several times, Midlen rebuffed; then JSM challenged his very entitlement to

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> Had it been, none of the funds would have left my escrow account. Which would have meant JSM would not have received its end-of-year two hundred grand, the legal bill would not have been discounted and not only would JSM's proceeds have arrived in Baton Rouge later, they would have been smaller.[2] Given the Ministry's payment history, the one thing that is not negotiable is that I remit anything to JSM while leaving payment of my legal fees to some future agreement and compensation. First, I am not that naive. Second, I think such an arrangement would be contrary to the District of Columbia Rules of Professional Conduct because it would transform what has been agreed upon in writing between me and JSM into *ad hoc* oral negotiating. Not exactly a scenario that builds attorney/client trust or respect.
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> 2. Presumably, and without researching the matter now, what was "in contest" would have been retained in escrow, the uncontested legal fees paid and the difference wired to Baton Rouge

withdraw legal fees from the collected royalties. As to one of the years' royalty collections, an Addendum to a previously executed Settlement Agreement became necessary in order to move funds out of a common escrow for distribution to individual claimants such as JSM.

The Court's opinion with regard to both violations and sanction rests on three core holdings: (a) Midlen deducted fees from escrowed royalty payments "when he could not reasonably have doubted that JSM disputed his entitlement to the fees." App. 2a. (b) "[B]y September 1998 when Midlen withdrew from the escrow account attorney's fees totaling more than $12,000, it could not have escaped his knowledge that . . . this was 'without authorization of [JSM]' and that JSM disputed his entitlement to [withdraw] the fees." App. 13a; (c) "Midlen (i) executed the Addendum in direct contravention of his client's instructions; and (ii) failed to tell his client that he had taken this action, even though he had several opportunities to do so." App. 23a-24a (internal quotations omitted). To make these holdings, the Court expressly adopted the Board's factual findings and inferentially rejected the Committee's findings, including its credibility findings.[7] This was improper, and violated due process, because both the Board and the Court were bound to accept the Committee's factual findings, especially its credibility findings. Instead, in complete rejection of this Court's reasoning in *Blakely v. Washington*, 542 U.S. 246 (2004) the

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[7] The Court adopted the Board's factual findings, summarizing those pertaining to the misappropriation charge, App. 3a-8a, and quoting almost verbatim others relating to the dishonesty charge. *Id. at* 18a-22a.

Board, to be followed by the DCCA, went on to make findings not found by the triers of fact and in most respects contrary to the findings made by the triers of fact.[8] Moreover the Court's opinion fundamentally changed the parameters of attorney-client engagement contracts by confusing impermissible client conduct with a "fee dispute," App. 13a-14a, thereby necessitating abrogation of the engagement agreement. As to the accounting charge, the Court improperly construed Rule 1.15(b), failing to apply this Court's fundamental rules of statutory construction, in violation of due process.

The sanction ordered by the Court also violates due process, because it adopted the Board's tainted findings, ignoring completely Midlen's unblemished career, his leadership involvement with his church, other mitigation evidence, and the absence of any need to protect the public. Moreover, the sanction is inconsistent with those imposed in recent comparable negligent misappropriation and dishonesty cases, in violation of D.C. Bar R. XI §9 (g) and, to the extent the sanction relies on facts that the Committee did not find, violates Midlen's right to due process under *Blakely v. Washington.*

The Violations Report is the product of four days of evidentiary hearings where the Hearing Committee heard testimony from nine witnesses and received into evidence over 200 exhibits. The Report is organized into 132

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[8] The Court dropped a footnote suggesting that the Board's findings of fact were not contradictory of the Committee's findings of fact. App. 12a (note 7). Such is pure fiction, as is set out *infra* at p. 10 n.8 and pp.13-14.

numbered Findings ("Violations Findings") and, in a separate section, unnumbered Conclusions of Law, including credibility findings. In addition, there are subsidiary findings of basic facts within the Conclusions of Law, *e.g.* that JSM briefly protested legal fees twice but the fees were not disputed at the time Midlen withdrew them and, notwithstanding Midlen's offer to let successor counsel review the JSM files anytime he wished, that offer was never accepted.[9] The Violations Report includes both implicit and explicit credibility determinations.[10]

Bar Counsel never argued, not in his[11] Brief or at oral argument, that the Violations Findings were not supported by substantial evidence, and he ultimately conceded the validity of the Violations Findings and embraced them in their

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[9] Many other such findings are in the Violations Report: (JSM knowledgeable about Addendum), (no charge of unauthorized action by counsel), (Midlen sent the Addendum as escrow agent), (Midlen credited: once a new invoice is printed, prior hours' work cannot be retrieved from computer), (Bar Counsel contention "frivolous"), (Midlen needed files to prepare accounting), (Bar Counsel attempted to elicit testimony from witness he knew to be unknowledgeable as well as made a proffer without a factual basis), (in the period preceding file turnover, Midlen was "organizing and disentangling the various files"), and (various findings regarding improper conduct of prosecutor).

[10] *See, e.g.*, Violations Finding 31 (re: complainant), Violations Finding 131 (re: complainant), and Violations Finding 132 (Midlen was "entirely credible;" complainant "was deliberately evasive and unhelpful;" and complainant's sister/executive assistant "knew very little").

[11] At the time of proceedings before the Hearing Committee and the Board, the post of Bar Counsel was occupied by a female.

entirety.[12] Therefore, when Bar Counsel's exceptions were considered by the Board, and then when this case was heard by the Court, there was no dispute that substantial evidence supported the Committee's Violations Findings. In other words, it was stipulated that there was "enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (citation omitted).

The Court below knew it was "bound – as is the Board – by the hearing committee's findings of fact." *In re Austin*, 858 A.2d 869, 877 (D.C. 2004) citing *In re Kitchings,* 779 A.2d 926 (D.C. 2001), after remand, 2004 D.C. App. LEXIS 397 (Board was obligated to accept stipulation of facts between respondent and Bar Counsel). The Board certainly did not consider itself "bound" by the Committee's Violations Findings. Rather, the Board reviewed the written record and *sua sponte* found new facts, ignoring all aspects exculpatory of Midlen,[13] thereby violating his "right to have 'a meaningful opportunity to

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[12] This occurred at Oral Argument before the Board. Based on this, Midlen filed a motion to dismiss, which the Board denied on its merits.

[13] This hardly passes muster under *Holmes, supra*, 126 S.Ct. at 1735:

> by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary". . . .

present a complete defense.'"[14] In doing so, the Board violated its own Rule 13.7 which dictates that, "[w]hen reviewing the findings of a Hearing Committee, the Board shall employ [the] 'substantial evidence on the record as a whole' test" (emphasis added) and reduced this case to a mere paper proceeding.[15] Except in the case at bar, the DCCA has consistently held that Rule 13.7 requires the Board to defer to a hearing committee's findings of subsidiary facts, *e.g., In re Micheel*, 610 A.2d 231, 234 (D.C. 1992),[16] and to a hearing committee's credibility findings. *In re Appler*, 669 A.2d 731, 739 (D.C. 1995); *In re Gilchrist*, 488 A.2d 1354, 1357 (D.C. 1985).

Nor did the Court consider itself "bound" by the Committee's Violations Findings—even in the face of the *Blakely* argument with which it was presented. Instead, the Court accepted almost uncritically the Board's flawed factual findings, contrary to *Austin, supra,* and its antecedents, compounding the Board's violation of its Rule 13.7. And,

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[14] *Id.*

[15] The Board interpreted the predecessor to Rule 13.7 to permit the Board only to "'make additional findings of fact . . . which are uncontested on the record,' *i.e.*, which do not contradict Committee findings that are supported by substantial evidence." *In re Anderson*, 778 A.2d 330, 341 n.8 (D.C. 2001) quoting *In re Chang*, 694 A.2d 877, 879 n.3 (D.C. 1997) (Board Report). In *Chang*, the Board recognized its authority to be limited to making additional findings of fact "which are uncontested on [the] record and supported by clear and convincing evidence." 694 A.2d at 879 n.3 (emphasis added); see also Rule 13.7.

[16] The Court noted *Micheel*, *see* App. 12a, n.7, but failed to apply it faithfully to this case.

like the Board, the Court ignored the Committee's credibility findings, although the Committee was uniquely able to see and hear the witnesses, observe their demeanor, and assess their trustworthiness and integrity, notwithstanding that the Court knew better.[17]

The Court's improper deference to the Board's factual findings, rather than to the Committee's factual findings, and especially the Court's disregard of the Committee's credibility findings, denied Midlen due process.[18] Each of the Court's core holdings described above is irreconcilable with the pertinent facts found by the Committee. With regard to the core holdings on the misappropriation charge, the Committee wrote, "The Committee finds JSM briefly disputed [Midlen's] fees in late 1994 and again in 1996, but failed to reply to [Midlen's] repeated invitations to specify its criticism or resolve the dispute." Continuing, it said "Respondent drew the entirely reasonable conclusion that JSM had answered whatever questions it had. Respondent thus believed that JSM no

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[17] *In re Soininen*, 853 A.2d 712, 725 (D.C. 2004), "The Hearing Committee saw and heard Ms. Soininen testify, and was in the best position to assess her demeanor and credibility at the hearing on May 20, 2002. We must therefore accept the Committee's evaluation of her testimony." *See also In re Haar, supra,* 667 A.2d at 1354 (emphasis added).

[18] The Court below long ago recognized the fundamental principle that, because "disciplinary proceedings are quasi-criminal in nature and . . . an attorney who is the subject of such proceedings is entitled to procedural due process safeguards." *In re Williams*, 464 A.2d 115, 118-119 (D.C. 1983) citing *In re Ruffalo, supra*, 390 U.S. at 550.

longer disputed his fees when he withdrew money from his escrow account to satisfy JSM's outstanding fee obligation." Further, "The Committee finds that [Midlen] did all that could reasonably be expected of a lawyer with a deliberately uncommunicative client. JSM, which had the benefit of advice from two outside lawyers . . . never framed its dispute with [Midlen] as a dispute over fees." The Committee properly understood JSM's rebuffed efforts to change the underlying engagement contract for what they were; contrarily, the Court, by equating that with a "fee dispute" under *Haar, supra,* unconstitutionally adopted a rule abrogating contracts of engagement any time an unhappy client seeks to change unilaterally the remission of damages or recovered funds provisions therein. *United States Constitution, Article I, section 10.*

Similarly, the core holding on the dishonesty charge—which rises or falls on the presence or absence of an underlying rules violation--conflicts with the Committee's relevant findings and flies in the face of *Blakely*. For example: "As JSM had not raised any specific objections [to the Addendum], [Midlen] executed the Addendum on behalf of [Jerry Falwell's] Old Time [Gospel Hour] and JSM on December 16, 1997. . . ." And, "JSM never indicated a specific objection to the Addendum during the several months it was being discussed...." Moreover, "nor did [Midlen] receive [JSM's other counsel's] letter . . . [instructing Midlen not to sign] until after the Addendum had been signed." Extremely significant: "The Committee finds it more likely that [Midlen] executed the Addendum because he had said he would." There followed: "The execution of the Addendum was a ministerial act, in [Midlen's] view."

"[Another witness], who was counsel for other claimants in the process, also testified that he regarded it as ministerial. . . ." and "JSM had given [Midlen] conflicting instructions about the Addendum. . . ." Ultimately, "[t]he Committee finds that JSM tried to use the execution of the Addendum as away to ask again for information from [Midlen], and possibly a way for JSM to delay its payment of legal bills to him." Moreover, DCCA's core holdings could not have been reached without rejecting the Committee's credibility findings, *e.g.*, "The Committee found [Midlen], by contrast [to the complainant], to be entirely credible. His answers, even if prolix on occasion, were forthright, responsive, and candid." Discussing the complainant's credibility: "Based on the Committee's assessment of Mrs. Swaggart's testimony and of her demeanor, we find that she was not a credible witness."

There are constitutional limits to the sanction that the DCCA may impose because an attorney who is the subject of disciplinary proceedings is entitled to procedural due process safeguards. Citing this Court's *In re Ruffalo* in its own *In re Williams, supra,* 464 A.2d at 118-119, the DCCA nonetheless here violated Midlen's due process rights by imposing a sanction harsher than that which the Committee's factual findings would allow. *Blakely v. Washington, supra,* dealt with criminal sentencing by a judge and the Sixth Amendment right to have a jury determine the facts upon which a sentence is based. As the Court explained, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . , and the judge exceeds his proper authority." 542 U.S. at 304. *See also*

United States v. Booker, ___ U.S. ___, 125 S.Ct. 738, 749 (2005). This rationale is equally compelling in disciplinary cases in light of the due process rights that attach to these proceedings. The Court below has established Rules to implement a wholly analogous process that assigns a jury's fact-finding function to a hearing committee, imposes the rigorous clear and convincing evidence standard of proof, and demands deference to the facts so found. Thus, the Court below exceeded its "proper authority" when it ordered a sanction based on facts which a hearing committee did not find and which are essential to the sanction imposed, *i.e.*, those underlying the core holdings described above which (a) are contradicted expressly by the Committee's actual findings and (b) rest improperly on the Court's inferential rejection of the Committee's credibility findings.

In resolving the two minor issues, *i.e.*, tardiness of the accounting and tardiness of the transfer of files to successor counsel, against Midlen, the Court ignored or rejected this Court's guidance on statutory construction. Even the DCCA has earlier held that principles of statutory construction apply to interpretation of rules of professional responsibility. *Neuman v. Ackman*, 715 A.2d 127, 131 (D.C. 1998) (applying principles of statutory construction to Rules of Professional Conduct). As to the accounting—which was provided and was never challenged--several of this Court's familiar rules of statutory construction are applicable to this case, including the *plain meaning* rule[19] and the rule requiring that ordinary rules of grammar, such as the last

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[19] *United States v. Cleveland Indians Baseball Co.* 532 U.S. 200, 121 S.Ct. 1433, 1440 (2001).

antecedent rule, be applied.[20] The Court below gave Rule 1.1.5(b) a tortured reading, in violation of the plain meaning and last antecedent rules to find JSM was entitled to *any* accounting, and even if it were, that Midlen was slow to notify and to account to JSM for the royalty payments he received on its behalf.

Rule 1.15(b) provides in its entirety:

> Upon receiving funds or other property in which a client or third person *has an interest,* a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person *is entitled to receive* and, upon request by the client or third person, shall promptly render a full accounting regarding *such property*, subject to Rule 1.6. (Emphasis added).

The DCCA's first error was in concluding that the Rule's notice requirement applied to this case. Rule 1.15(b) commences with a notice obligation, the applicability of which is to funds "in which a client or third person *has an*

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[20] *Jama v. Immigration and Customs Enforcement*, ___ U.S. ___, 125 S.Ct. 694, 700-01 (2005) ("[T]he grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)).''

interest...." (Emphasis added). However, the *undisputed* evidence showed that JSM had no interest in the funds, other than to know how much its debt to [Midlen] might be reduced by the application of the royalties thereto. Since JSM had no interest in the funds on deposit due to its zero net entitlement, it cannot be said that the funds in issue were funds in which the client "ha[d] an interest"; therefore as to JSM there was no notification requirement at all – prompt or otherwise. Accordingly, it was error to have found a Rule 1.15(b) notice violation. Even were that not error, the Court clearly erred by interpreting the rule to require an accounting of funds regardless of JSM's entitlement to receive them. The Rule in fact requires only an accounting for "any funds or other property that the client or third person *is entitled to receive*" (emphasis added), activating the rule of the last antecedent. In effect, the Court interpreted the Rule so that the term "such property" within the phrase "shall promptly render a full accounting regarding *such property*" to refer back to the term "has an interest," skips over the last antecedent "entitled to receive."[21] The last antecedent phrase "entitled to receive" is much narrower than "has an interest." Therefore, since an accounting, prompt or otherwise, is due only as to funds a client is entitled to receive and JSM was entitled to receive none--the Committee found that JSM was not entitled to receive any of the royalty distributions "because [Midlen] was entitled to deduct unpaid legal fees from any cable royalty distributions awarded to JSM"[22]--it was due no

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[21] The premise is strengthened by the fact that the two terms are contained in the same sentence, whereas the phrase "has an interest" is in the preceding sentence.

[22] Further, "JSM was well aware of its outstanding unpaid legal fees to [Midlen] (reaching a high total of $70,787.76 by May

accounting. Accordingly, Midlen could not have violated the accounting obligation of Rule 1.15(b) as written.

In determining that Midlen was unacceptably slow to turn over the files to successor counsel, the Court below not only violated *Blakely* by relying on facts found by the Board which were contrary to those found by the Committee, *e.g.*, note 9, *supra*, but violated this Court's *plain meaning* injunction. Bar Counsel's charging document misleadingly alleged that Midlen "failed to take timely steps to the extent reasonably practicable to protect the client's interest, by failing to surrender papers and property to which the client was entitled . . . ." However, Rule 1.16(d) reads:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....

The plain meaning of the Rule is that it is mandatory as to insuring protection of the client's interest but is merely descriptive as to how that may be done; "such as" certain methods are suggested, including surrendering papers. Apparently the Court below would have "such as" read instead "including but not limited to." It cannot be seriously

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1996) and that any cable royalty distribution it would receive in late 1997 or early 1998 would not cover unpaid legal fees that were $34,806.44 on December 30, 1997."

suggested that JSM's interests were not adequately protected given the findings that are part of the Hearing Committee's Conclusions of Law[23] and other uncontradicted evidence. It is up to counsel how to protect the client's interests, not the client and not, with the benefit of 20-20 hindsight, the Court. So long as the client's interests are adequately protected, there can be no rule violation.

Finally, the Board, for all of the things it did wrong, properly conceded that JSM was in no way injured by any of the alleged rule violations. BPR Report at 75. This, the DCCA ignored.

B. Arguments Raised Below Rule 14(g)(i)

The plain meaning and ordinary grammar arguments were first raised before the Board in Respondent's Motion to Dismiss, filed in June 2003, and were rejected on the merits in its BPR Report dated July 15, 2004. The due process and

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[23] Midlen "wrote, though, that he would have some trouble extracting the JSM file from the other files that pertained to Old Time and to the cable royalty process generally." *See BX 23* see also Tr. III at *122-23*. "Furthermore, [Midlen] gave [JSM's new counsel] access to the JSM files before he turned over copies of the files to him." TR. III at 123. "The Committee, which found [Midlen] credible in this and other respects, accepts this explanation for the delay." New counsel "never came to examine them. Bar Counsel has not identified any way in which the delay in turning over the file failed to safeguard the client's interests during the ongoing royalty proceeding." *See also* RX 146; Tr. IV 109-113 ([Midlen]).

Blakely arguments were raised before the Court below in Midlen's brief on exceptions filed in October 2004 and in his Reply Brief filed in January 2005. They were rejected or ignored. The plain meaning and ordinary grammar arguments were also rejected by the DCCA. All of the foregoing plus the Article I, Section 10 argument were raised in Midlen's Petition for Rehearing which was denied without opinion. App. 26a.

REASONS FOR GRANTING THE PETITION

A. The District of Columbia Court of Appeals' Interpretation of What Constitutes "Misappropriation" Under Rule 1.15(c) of the Code of Conduct Has National Implications Given Its Similarity to the Model Rule and Corresponding Rules of All or Most Other State Jurisdictions, and Does Not Admit of Application In the Face of Contrary Findings by the Triers of Fact—An Important Federal Question That Has Not Been, But Should Be, Settled by This Court

Initially it is noted that the triers of fact found, as we have quoted above, that there was no fee dispute between Midlen and his client, JSM. Shortly after it was conceded on the record by Bar Counsel that the Hearing Committee's findings of fact were not contested, Midlen filed with the Board his exhaustive "Respondent's Motion to Dismiss" establishing that given the Committee's voluminous and comprehensive findings, it was impossible to arrive at any

conclusions of guilt of any rules infractions. That motion predated this Court's opinion in *Blakely* by about one year, but action by the Board was still three weeks away at the time *Blakely* was decided. *Blakely* generated enormous media coverage at the time of its release due to perceived implications for the Federal Sentencing Guidelines. Evidently, the Board was oblivious.

Midlen's right to be judged by a committee of his peers was created by DCCA rule. Blakely's right to be judged by a jury of his peers was created by the Sixth Amendment. It is well settled that once bestowed, a right may not be withdrawn without due process of law.[24] Thus,

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[24] *Bowen v. Roy*, 476 U.S. 693, 731-32 (1986)(O'Connor, concurring in part and dissenting in part):

> The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution:
> "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6 [89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600] (1969). "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398 [83 S.Ct. 1790, 10 L.Ed.2d 965] (1963)" *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970) (footnote omitted).

this Court is confronted with the issue of whether *Blakely* and its principle should be extended from the criminal context to the quasi-criminal attorney disciplinary context. Given that it would not ordinarily occur to the reasonable man (or reasonable attorney) that a client's unilateral attempt to amend a bilateral legal services contract is tantamount to a fee dispute, the DCCA's holding to the contrary is of national significance and importance since all, or most, states have a similar rule of professional conduct on their books. See ABA Rule 1.15(e), *supra* at 4. There having been found that no fee dispute existed, that finding should not have been displaced simply because the Court saw the legal interpretation differently. Misappropriation was, of course, the eight hundred pound gorilla in the action below. Without the usurpation of fact finding contrary to *Blakely*, no such finding by the Court could have occurred and without it the sanction administered could not have happened. With the DCCA's opinion on the books, personal injury and all other attorneys nationwide who are to be paid out of the corpus are at risk of having their reputations sullied, as has been Midlen's, and their livelihoods destroyed.

Similarly, the triers of fact found that Midlen had not been charged with taking an action (signing the Addendum) not countenanced by his client and specifically refused to make findings that would look to such a charge. Undaunted, the Court went ahead and made its own findings, based on the Board's findings, as if such a charge had been lodged. It would seem that no more flagrant violation of the *Blakely* command is possible. The comparison is compelling: the

guilt was "based not on facts proved to his peers beyond a reasonable doubt,[25] but on facts extracted after trial from a report compiled by a probation officer[26] who the judge thinks more likely got it right than got it wrong." 124 S.Ct. at 2542. As Justice Scalia summed up: "[o]ur Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Id.* at 2543 (citing 3 Blackstone, *Commentaries*, at 373-74, 379-381). At trial, Midlen prevailed not only on a finding that Bar Counsel had not charged unauthorized action, but on the merits as well. *Supra* at 13-14. The lower Court's usurpation of the fact finding role was the same "judicial inquisition" as was condemned in *Blakely*.

Neither the misappropriation nor the unauthorized action charge was conceivable based on the Hearing Committee's findings of fact. Thus, the issue here is: are attorneys faced with losing their livelihoods and reputations[27] entitled to the same due process considerations[28] in the disciplinary process as are afforded those in peril of losing their freedom or their lives? This Court has never before confronted that issue, and it should.

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[25] Here, clear and convincing evidence.

[26] Here, the Board.

[27] *Bolling v. Sharpe, supra,* 347 U.S. at 499-500: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

[28] U.S. Const., amend V; *Id.* at amend XIV, § 1.

B. Due Process Has Long Meant Criminal Defendants Are Entitled to Be Able to Read a Statute and Comprehend Its Meaning; So Too, Must Attorneys Subject to Rules of Professional Conduct Be Entitled to Rely on Those Rules' Plain Meaning and Ordinary Grammatical Construction.

Essentially, the Court below can be heard to say it rejects Midlen's plain meaning and ordinary grammar arguments because it does not like what the Rules at issue would say if properly construed. Recently, this Court has gone to some lengths to set forth principles of statutory construction. *E.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh*, ___ U.S. ___, 125 S.Ct. 460 (2004); *Jama v. Immigration and Customs Enforcement*, ___ U.S. ___, 125 S.Ct. 694 (2005). In *Jama* this Court applied and described "the grammatical 'rule of the last antecedent,'" as "according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' *Barnhart v. Thomas,* 540 U.S. 20, 26 (2003)." 125 S.Ct. at 700-01. As set out above, the plain meaning and last antecedent rule are crucial to determining whether Midlen committed violations of Rules 1.15(b) or 1.16(d). Simply put, if the word "such" ordinarily refers back to that which immediately precedes it, then Midlen could not have violated Rule 1.15(b). And if the plain meaning of Rule 1.16(d) is that the client's interests must be protected upon an attorney's termination, there is simply no doubt there was no violation, irrespective of how long it took to transfer the files to successor counsel (or whatever the reason). These two

rules are virtually identical to the corresponding ABA model rules,[29, 30] and as such they, too, are in effect in most of the

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DC Rule 1.15(b)	ABA Rule 1.15(d)
Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.	Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

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Continued on next page

various states. In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), Justice Douglas said: "This ordinance is void for vagueness . . . in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. . . .'" quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954). We ask that this Court determine that an attorney "of ordinary intelligence" is one who when reading a rule of professional conduct would ordinarily look to its plain meaning and/or apply basic rules of English grammar and that a court's abandonment thereof is not fair notice, constituting a deprivation of due process[31] under the Fifth and Fourteenth Amendments to the Constitution.

DC Rule 1.16(d)	ABA Rule 1.16(d)
In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned....	Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which he client is entitled and refunding any advance payment of fee or expense that has not been earned. . . .

[31] *Bolling v. Sharpe, supra,* 347 U.S. at 499-500: "Liberty under law extends to the full range of conduct which the individual is

C. Section 10 of Article I of the Constitution Does Not Permit An Agency of the District of Columbia to Impair the Obligation of Contracts.

To be sure, the opinion of the Court below is not a "law" as set out in Article I, Section 10, but then neither have been most of the activities evaluated pursuant to the First Amendment, which provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ." We submit it is "unthinkable"[32] that the Court might do that as to which the United States Congress or the D. C. City Council is specifically prohibited.[33] Article I, Section 10, clause 1 provides "No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." While the District of Columbia is, technically, not a state, neither was it fifty-two years ago when *Bolling v. Sharpe, supra,* was decided.

All over the country, attorneys enter into engagement agreements where their legal fees are to be paid out of any recovery—whether that recovery be in tort or in collection. Once the recovery is either agreed to or paid in, the client must not be allowed to unilaterally alter the legal services agreement on pain of the attorney who adheres to same being

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free to pursue, and it cannot be restricted except for a proper governmental objective."

[32] *Id. at* 500.

[33] *Id.*

hauled before a disciplinary committee. Imagine a situation where counsel's agreement with his client permits deduction of, say, one third of any recovery, with the balance to be remitted to the client. A quarter million dollar settlement is negotiated and signed. While the funds are en route to the attorney's escrow account, the client dispatches a letter to his counsel advising that he now disputes the attorney's right to withdraw his fee, instructs counsel to remit all monies collected to the client, and informs counsel that he will be compensated when it is subsequently agreed between attorney and client as to how much the attorney is entitled. That, essentially, is what happened to Midlen.[34] Unthinkable that the attorney need change the course of action set out in his contract with the client? Not according to the challenged opinion below. Should not such client conduct be dismissed as patently absurd—and without force or effect? Not according to the challenged opinion below. The *Midlen* Court seems not to have perceived that when parties negotiate "in a state of uncertainty, the promisee who perceives a risk of bearing uncompensable reliance cost will insist on more favorable terms to offset those costs and risks"[35] or that unknown liability and ambiguity in contracts increase the cost of business. Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 Am. Bus. L.J. 441, 461 (2001).

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[34] Except his fees were per hour, not a percentage.

[35] Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 Hastings L.J. 621, 681 (1993)

It would appear that this Court has not heretofore determined that no instrumentality of a state can do what its state legislature is barred, on the face of the Constitution, from doing. This is an important question of federal law that should be settled by this Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the District of Columbia Court of Appeals.

Respectfully submitted,

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June 2006

APPENDIX A — OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DECIDED NOVEMBER 10, 2005

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 04-BG-808

IN RE JOHN H. MIDLEN, JR.,

RESPONDENT.

A Member of the Bar
of the District of Columbia Court of Appeals
(Bar Registration No. 36384)

On Report and Recommendation
of the Board on Professional Responsibility
(BDN 165-98)

(Argued October 18, 2005 Decided November 10, 2005)

Before SCHWELB and FARRELL, *Associate Judges*, and NEBEKER, Senior Judge.

FARRELL, Associate Judge: The Board on Professional Responsibility (the Board), rejecting the contrary determination by a Hearing Committee, concluded that respondent John H. Midlen, Jr. (Midlen) had misappropriated client funds within the meaning of Rule 1.15(c) of the Rules of Professional Conduct.[1] Because the Board also concluded that he had done

1. The Hearing Committee, not crediting some of the testimony on behalf of the client (on matters we deem essentially immaterial), (Cont'd)

so recklessly, it recommends that he be disbarred. *See In re Addams*, 579 A.2d 190 (D.C.1990) (en banc).[2] The Board's conclusion and recommendation stem from Midlen's representation of an entity known as Jimmy Swaggart Ministries from 1991 until 1998, during which time he repeatedly deducted his attorney's fees from royalty payments destined for JSM but distributed to and held by Midlen as escrow agent. In its principal ruling, the Board found that Midlen had paid himself these fees despite the fact that, at least as of late 1994, a "dispute" between himself and JSM under Rule 1.15(c) had arisen concerning both the amount of fees Midlen was billing and his right to deduct them from the distributed royalties. The Board found these deductions to be reckless, because they "evidenced a conscious indifference to the consequences of his actions and to his client's legitimate interest in the entrusted funds."

We agree with the Board that Midlen misappropriated funds entrusted to him. He repeatedly deducted fees from the escrowed royalty payments when he could not reasonably have doubted that JSM disputed his entitlement to the fees, a situation that imposed on him the duty to keep the funds "separate . . . until the dispute [was] resolved." Rule 1.15(c). We do not agree, however, with the Board's conclusion of

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(Cont'd)

had rejected the charge of misappropriation. It found only that Midlen had violated Rules 1.4(a) and 1.15(b) (failure to provide a prompt accounting), and recommended that he be informally admonished.

2. The Board found additionally that Midlen had violated Rules 1.4(a) and (b), 1.15(b), 1.16(d), and 8.4(c) (dishonesty), the latter based partly — but not entirely — on the misappropriation of funds.

recklessness. In light of what the Board admits was a "complex factual history," including conflicting actions and signals by a client whose own conduct the Hearing Committee, with record support, found to be characterized by bad faith, and the fact that Midlen's ultimate entitlement to the fees he deducted is not questioned, his conduct did not rise to the level of intentional or reckless misappropriation warranting disbarment under the *Addams* rule. We nevertheless agree with the Board that Midlen's misconduct, in the aggregate, was serious and requires a lengthy period of suspension. We accept the Board's "alternative [recommended] sanction" and suspend him from the practice of law for eighteen months.

I.

Midlen began a private practice of law in 1970 and later formed a partnership with Gregory Guillot under the name Midlen & Guillot, Chartered (M & G). In 1991, M & G was retained by Jimmy Swaggart Ministries (JSM), which produces and broadcasts religious programs that air on various cable television outlets. M & G was retained by JSM to represent it in the cable royalty distribution process, a creature of federal law by which the Librarian of Congress distributes royalties to copyright owners. The distribution process has two phases. In the first phase, royalties are allocated among eight designated "claimant" groups (including the Devotional Group, of which JSM was a member); in the second, payments are allocated within each claimant group. If the members of the claimant group agree on an allocation, they sign an agreement (a Settlement

Agreement) specifying the distribution, otherwise they litigate the proper allocation.[3]

The 1991 retainer agreement between Midlen's firm and JSM provided that services generally would be billed on an hourly basis and that JSM was expected to make "full and prompt payments of the amounts invoiced." M & G agreed, however, "at least for the 1990 [royalty] claim period, . . . to allow [JSM] to pay only our out-of-pocket expenses until such time as the royalties actually are distributed." Once that happened — *i.e.*, when 1990 distribution checks were sent to M & G as escrow agent, see note 3, *supra* — M & G would "deduct the fees incurred as of that date for professional services rendered" and "forward [ ] the balance to [JSM]."

In July 1991, and for each July thereafter until 1997, Midlen filed a claim with the Library of Congress on JSM's behalf for royalties earned in the preceding year. In 1992, after deducting its attorney's fees and expenses from the first distribution for the 1990 claim period, M & G sent the rest of those funds to JSM. In September 1993, M & G sent JSM a second disbursement check for that claim period, pointing out that its legal fees had been deducted from this distribution as well. An accompanying spreadsheet stated that a balance of $10,009.22 was being "reserved," *i.e.*, not disbursed, by M & G. JSM informed Midlen that it would not consent to M & G holding this "reserve"; it reminded him that costs other than out-of-pocket expenses were to be reimbursed to

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3. Midlen had acted as agent for the Devotional Group escrow account (to which royalty payments are initially distributed) since at least 1991, and was still serving in that capacity at the time of the disciplinary hearing.

M & G "when [royalty] funds are disbursed — not escrowed against." JSM said nothing in opposition to the two fee deductions M & G had taken from the distributed funds. Midlen forwarded the $10,009.22 to JSM.

In late 1994, JSM's Chairman of the Board of Directors, Clyde Fuller, wrote Midlen expressing concern about the amounts being billed in light of the results achieved. Near the end of December 1994, Midlen informed JSM that his legal fees would be deducted from the upcoming 1991 royalty distribution. Although it appeared that JSM owed M & G substantial overdue fees, Fuller objected to the deductions in several phone conversations. On December 27, 1994, JSM instructed Midlen in writing that "no attorneys' fees are to be withheld from the proceeds. In other words, the entire amount disbursed is to be sent to us and we will, in turn, reimburse your firm when an amount is agreed upon." When Midlen objected to these instructions as contrary to the retainer agreement, JSM fired him.[4]

Nevertheless, a few days later the claimants in JSM's group reached a settlement enabling JSM to receive a 1991 distribution, and JSM rehired Midlen — in order, Frances Swaggart of JSM testified, to insure that JSM obtained this money. On or around January 3, 1995, JSM received a distribution from M & G from which Midlen had withheld $20,000 in attorney's fees and costs. JSM made no objection to this deduction. In late January 1995, Midlen and Guillot

4. Both the Hearing Committee and the Board concluded that Midlen had been fired at this point although — as the Board stated — "the exact circumstances [of the termination] are not clear from the record."

dissolved their partnership and Midlen formed his own law firm. In a letter, he proposed that JSM continue its relationship with him on the same basis as before, and JSM accepted, remaining with him because, as Frances Swaggart testified, "his fees were lower than" Guillot had proposed in similarly offering to represent JSM. At this time, too, JSM raised no questions about Midlen's deductions of fees from royalty payments or the size of his fees.

On August 18, 1995, however, Mrs. Swaggart sent a letter to Midlen stating that JSM "continued to disagree with [him] concerning [his] billings over the past two years and that the matter must be resolved." The letter complained that his last bill was "ridiculous" and directed him to "list the hours you work for us plus state the charge per hour." It continued:

> You also know that we do not give and we have not given you permission to deposit any royalties into your account, delete your expenses, and remit the balance to us. Instead, we have consistently instructed you to send the full amount of royalties received to us and we will remit payment to you. However, that remittance will only be when we feel we are being charged the correct amounts for the work done and your invoices are in the format requested.

A second letter to Midlen from Barry Miller, an attorney for JSM, in October 1995 reiterated the request that Midlen itemize the hours spent on each daily service referenced in his bills. Miller further expressed his belief that JSM had not authorized Midlen to deduct legal fees directly from

royalty disbursements, a practice "particularly problematic since there may be a dispute concerning your bills." Midlen answered the October letter by proposing different formats for his bills and by reminding Miller of the original engagement letter. "Given the Ministry's payment history," Midlen wrote, "the one thing that is not negotiable is that I remit anything to JSM while leaving payment of my legal fees to some future agreement and compensation."

In March and May 1996, Midlen notified JSM that distributions would soon be issued for the 1992 and 1993 claim periods, but that JSM's share would be insufficient to cover his unpaid legal fees. On multiple occasions after 1996 and through 1997, Midlen received royalties on JSM's behalf but failed to notify it of the distributions. This prompted Miller in August 1996 to write to Midlen requesting an accounting, because "it appears that you did receive some distributions and that you, without authorization of the Ministries, applied them to payment of your legal fees which we still question." In October 1996, Miller again wrote Midlen asking for "an accounting of all sums which have been collected to date and the disbursal of such sums." A year later in October 1997, Midlen wrote JMS a letter admitting that he had failed so far to provide "an accounting for monies received and disbursed since May 1996," and promising to furnish one.

Another lawyer for JSM, Frank Koszorus, met with Midlen in November 1997 and again asked for an accounting of monies received on JSM's behalf. In December, when Koszorus repeated the request for a "full, detailed and intelligible accounting of the royalty sums," Midlen twice

replied by admitting that the accounting he owed JSM was not completed. On or about February 9, 1998, JSM terminated Midlen's services and directed him promptly to deliver all files concerning JSM to Koszorus. Pointing to unanswered inquiries about its bills, JSM again told Midlen that he was not authorized to withdraw money from the sums held on JSM's behalf. During February and March 1998, a flurry of correspondence ensued in which JSM asked for the accounting and for its files, and Midlen requested more time to finish the accounting. On April 29, 1998, he sent JSM the final accounting which identified all royalty disbursements JSM had been entitled to and all escrow funds applied to unpaid legal fees from June 1996 to April 1998. Midlen did not turn over the JSM files until months later.

Previously, on October 31 and December 30, 1997, Midlen had written himself checks from his escrow account for $6,628.63 and $5,602.32, respectively, to pay down JSM's outstanding legal fees. He did not deposit either check until September 1998, after his services had been terminated and he had rendered the final accounting.

Altogether, Midlen had disbursed to JSM approximately $341,000 in royalty payments between 1992 and 1997, and paid himself some $123,000 in fees and costs during the same period. (JSM made direct payments to him, ending in 1994, of approximately $52,000). The Board found "no evidence on the record that Midlen took more [in attorney's fees and costs] than was his due."

Appendix A

II.

As explained earlier, the principal violations the Board found were misappropriation and dishonesty, the latter based partly on the misappropriation. "The most serious issues presented by this case," the Board stated, "concern [Midlen's] practice of withdrawing disputed legal fees from cable royalty payments he received on his client's behalf." Specifically, the Board inquired "whether [Midlen] could properly deduct his fees from these funds in the face of: (i) JSM's repeated demands that all the royalty payments be delivered to JSM; (ii) JSM's specific directives that [Midlen] was not to take payments for legal fees from these funds; (iii) JSM's repeated complaints about the quantum of [Midlen's] fees; and (iv) JSM's repeated requests for an accounting of fees withdrawn and royalties paid." The Board concluded that, on the facts presented, Midlen had misappropriated entrusted funds in violation of Rule 1.15(c). We agree.

Rule 1.15 provides in relevant part:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property.
>
> * * * * *
>
> (c) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer

> and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 1.15(a) & (c). As the Board pointed out, neither subsection — (a) or (c) — uses the word "misappropriation." Our decisions, however, have defined the term as "any unauthorized use of [a] client's funds entrusted to the lawyer," *In re Anderson*, 778 A.2d 330, 335 (D.C. 2001) (citation omitted), and Rule 1.15, among other things, proscribes the conduct that constitutes misappropriation. In this jurisdiction, charges of misappropriation arise most often under Rule 1.15(a). Indeed, until this case there have been only two reported decisions regarding the obligations of an attorney when "a dispute arises concerning the respective interests among persons claiming an interest in . . . property," Rule 1.15(c): *In re Haar*, 667 A.2d 1350 (D.C.1995) (*Haar I*), and *In re Haar*, 698 A.2d 412 (D.C.1997) (*Haar II*).[5] Nevertheless, we stated in *Haar I* that "[t]he rule is

5. Both of these decisions involved the predecessor Disciplinary Rule (DR) 9-103(A)(2), different in language from, but identical in meaning to, Rule 1.15(c).

unambiguous: an attorney may not withdraw a portion of . . . deposited funds when the attorney's right to receive that portion is 'disputed' by the client." 667 A.2d at 1353. In *Haar II*, we made clear that when what is disputed is the lawyer's entitlement to funds that presently or potentially belong to a client, a lawyer who withdraws the funds before the dispute is resolved has committed misappropriation. *See* 698 A.2d at 417-18 ("To the extent the withdrawal [from a joint lawyer-client account] 'is disputed by the client,' there is, necessarily, a [Rule 1.15(c)] misappropriation.").[6] Moreover, in *Haar I* we rejected the notion that any dispute over fees has to be "genuine": "[t]here is no requirement that the dispute be 'genuine,' 'serious,' or 'bona fide'. . . . [T]he word 'dispute' means [merely] 'to argue about;' to debate; to question the truth or validity of; [or] to doubt." 667 A.2d at 1353 (quoting THE AMERICAN HERITAGE DICTIONARY 380 (1976)).

Midlen's principal argument to the court is that there was never a fee dispute within the meaning of Rule 1.15(c), because (1) his original retainer agreement with JSM authorized him to deduct attorney's fees from distributed

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6. *Haar II*, acknowledging the intervening rule change, noted:

> The current version of Rule 1.15(c) makes clear that the lawyer shall not take his or her claimed share of a fund in which lawyer and client each claim an interest until there has been an "accounting and severance of interests in the property," and that any portion of the fund "in dispute shall be kept separate by the lawyer until the dispute is resolved."

698 A.2d at 418 n. 6.

royalties, and (2) JSM periodically "re-authorized" him to pay himself in that manner.[7] On the record summarized, and in light of the principles outlined, that argument is unavailing. The retainer agreement is hardly a model of clarity. It deferred payment of attorney's fees "at least for the 1990 claim period" until the royalties had been distributed, at which point M & G would deduct its outstanding fees before forwarding the balance. It thus left ambiguous whether the same procedure would govern disbursements for succeeding claim periods. Initially, JSM raised no objection when Midlen twice deducted fees from payments for the original claim period (protesting only his plan to keep a "reserve" against future fees earned), but by the end of 1994, JSM began questioning B & G's entitlement to continue that practice. Whether, even under Rule 1.15(c)'s undemanding test for a "dispute," a disagreement over the practice of deducting fees had arisen at that point is probably unclear. Despite its repeated oral and written instructions to Midlen in late 1994 not to deduct fees, JSM did not object when he again deducted $20,000 in fees from a January 1995 distribution for the 1994 claim period; and on dissolution of his partnership, it retained him

7. Midlen preliminarily argues that the Board wrongly substituted its own fact-finding for that of the Hearing Committee. He cites almost no specifics in this regard, however, and our comparison of the Board's statement of the evidence with the Committee's reveals that, for the most part, the differences were over "ultimate facts" — essentially "conclusions of law," *In re Micheel*, 610 A.2d 231, 234 (D.C.1992) — or (what may be the same thing) were different characterizations of the basic facts. The handful of instances where the Board may be said to have disregarded findings by the Board are not, in our view, material — except in a single instance mentioned in Part III, *infra*, where Midlen receives the important benefit of that finding.

again while mindful of his understanding that "[t]here [would] be no change in any of the arrangements as to [their] relationship."

Nevertheless, by August 1995 JSM was emphatically disagreeing with Midlen's "billings over the past two years," challenging the format of the bills and instructing him "to send the full amount of royalties received to us and we will remit payment to you." Two attorneys for JSM, Miller and then Koszorus, repeated the demands for itemization of time spent and disbursement of royalties without fee deduction on occasions from late 1995 through early 1998, when Midlen's services were terminated. There also began, and continued throughout that period, a succession of demands by JSM for a complete accounting of the distributed royalties and the fees and expenses Midlen had billed. Consequently, by September 1998 when Midlen withdrew from the escrow account attorney's fees totaling more than $12,000, it could not have escaped his knowledge that (as an August 1996 letter put it) this was "without authorization of [JSM]" and that JSM disputed his entitlement to the fees. That dispute, which did not have to be " 'genuine,' 'serious,' or 'bona fide,' " *Haar I*, 667 A.2d at 1353, imposed on Midlen the duty to "k[eep] separate" the funds in which both he and JSM "[claimed] interests" until "the dispute [was] resolved." Rule 1.15(c). He plainly did not do so.

Midlen argues that in finding misappropriation the Board "abrogated the retainer agreement" between JSM and himself, and that if JSM's "attempt to alter the existing fee arrangement were to rise to the level [of a fee dispute under Rule 1.15(c),] no engagement letter or agreement would be worth the paper it is written on" (Br. for Midlen at 21, 26).

But aside from the ambiguity of the retainer agreement we have noted, this assertion confuses contract law with an attorney's duties under Rule 1.15, which, as the Board and the Hearing Committee both recognized, arise because the lawyer has a fiduciary relationship with the client, rather than from the operation of a contract between them. *See In re Ryan*, 670 A.2d 378, 380 (D.C.1996) ("[A]ny supposed failure of a client to fulfill a retainer agreement is no defense to a disciplinary charge against an attorney.") As in *Haar*, Midlen may have had a "charging lien" on funds deposited in the escrow account to the extent JSM owed him outstanding legal fees and expenses, *see Haar II*, 698 A.2d at 416, but at the time he withdrew attorney's fees from the account — certainly by the time he did so in late 1998 — his entitlement to the funds was in dispute. *See Haar I*, 667 A.2d at 1355. The fact that, as it turned out, he was contractually entitled to more than the amounts he withdrew "does not change the nature of the disagreement . . . because at the moment [he] withdrew [the funds, the client] had not acknowledged he had earned and was entitled to at least that amount." *Id.* at 1353. Midlen misappropriated client funds under Rule 1.15(c).

III.

At the same time, we do not accept the Board's recommendation of disbarment, even though, as will be apparent, we agree with the Board that Midlen's conduct in the aggregate warrants a lengthy period of suspension. When an attorney is found to have committed misappropriation, the discipline required by our decisions almost invariably is disbarment if the attorney acted intentionally or recklessly in appropriating the client funds. *See Addams*, 579 A.2d

at 191. Recklessness, which the Board found here, requires proof at a minimum that the attorney handled entrusted funds "in a way that reveals . . . conscious indifference to the consequences of his behavior for the security of the funds." *Anderson*, 778 A.2d at 339.[8] Bar Counsel must prove that degree of culpability by clear and convincing evidence. *Id.* at 337. He has not done so in this case.

To begin with, since the twin *Haar* decisions, this is only the first case to reach the court in which misappropriation arose from a dispute about ownership of entrusted funds and failure to segregate them under Rule 1.15(c). (*Haar I* and *II* were issued in 1995 and 1997, respectively, midway through or toward the end of Midlen's relationship with JSM.) Disputed ownership thus distinguishes this case from those in which the court has found reckless (or worse, intentional) misappropriation because the lawyer had engaged in concealment or similar acts demonstrating that he clearly knew the funds did not belong to him, *see, e.g., In re Berryman*, 764 A.2d 760 (D.C.2000); *Addams, supra*, or because a court order to return the fee unmistakably had given him such notice. *See In re Utley*, 698 A.2d 446 (D.C.1997).[9]

8. *See also* BLACK'S LAW DICTIONARY 1277 (7th ed.1999) (recklessness is a "state of mind in which a person does not care about the consequences of his or her action") (quoted in *In re Romansky*, 825 A.2d 311, 316 (D.C.2003)).

9. This is not to say that a dispute over ownership of funds — resulting in a Rule 1.15(c) rather than a Rule 1.15(a) violation — insulates an attorney without more from a finding of reckless misappropriation. As will be apparent, our conclusion that Midlen was not reckless follows from the combination of factors we cite in this part of the opinion.

Equally significant, Midlen's entitlement to the fees he withdrew is ultimately not challenged. As the Board acknowledged, "there is no evidence on the record that Midlen took more than his due. Indeed, JSM eventually made further payments to him in settlement of his suit against it." Rule 1.15(c) does not allow an attorney to gamble that his claim to ownership of funds will be upheld, but Midlen's ultimate entitlement to the fees is evidence, nevertheless, that he was not acting with "conscious indifference to the . . . security of the [entrusted] funds." *Anderson, supra.*

Further evidence of this fact is the disagreement itself between the Board (unanimously) and the Hearing Committee (also unanimously) about whether there had been a fee dispute under Rule 1.15(c). The Committee found that JSM's expressions of dissatisfaction had not gone beyond "requests for information" about Midlen's billing practices ("[r]equests for information about prior bills cannot add up to a dispute over fees"), and that, in any event, JSM's actions in 1994 and again in 1996 — specifically its "months of silence" in not answering Midlen's communications about their fee arrangements — amounted to "abandonment" of any fee dispute JSM had had with him. The Board found these conclusions unsupported by the record, and so do we; at least by April 1998, Midlen could not reasonably have doubted that JSM was questioning the amount of his fees and his right to deduct them, thus triggering his duty to segregate the disputed funds. Still, the Board described what it termed a "factually complex" interaction between Midlen and JSM, and the record shows the message of JSM's complaints to have been mixed, sometimes appearing chiefly to be about the manner in which he itemized the work he

was billing. Not until mid-1995 did JSM first state its objection to his withdrawal of fees. But more importantly, the Hearing Committee made a finding that should not be ignored. Based on the testimony of JSM's own witnesses, the Committee found that "J.S.M.'s questions about the fees charged by [Midlen] were not raised in good faith," both because JSM was claiming inability to pay Midlen while it "was paying a biweekly payroll of thousands of dollars" and because, when JSM's business began "struggling," it "sometimes delayed payments to all vendors out of concern for its financial survival." (*See also* the Board's Report at 64, noting record support for the Hearing Committee's finding that a portion of JSM's conduct was "possibly . . . a way for JSM to delay its payment of legal bills to him.") These findings support the reasonableness of Midlen's belief, immaterial to whether there was a "dispute" but relevant to his culpability, that JSM was not genuinely disputing either his fees or his deduction of them from the royalties. Having reason to question the *bona fides* of JSM's complaints, in other words, Midlen was not reckless — he was not indifferent to the security of entrusted funds — by deducting attorney's fees that he correctly believed he had earned.

To summarize, Midlen was negligent in taking funds he should have segregated pending resolution of his dispute with JSM, but his actions did not reflect the heightened culpability that disbarment for misappropriation requires. The Board wishes its recommendation in this case to "serve as a warning to lawyers who have financial differences with demanding clients and are prompted to resort to self-help to resolve those differences." That lesson will be conveyed here even if, as we conclude, Midlen's misconduct does not deserve the severest disciplinary sanction the law provides.

Appendix A

IV.

We accept the Board's alternative conclusion that Midlen's misappropriation, combined with the other violations he committed, warrants suspension for a considerable period of time. Chiefly, the Board concluded that Midlen had breached his duty under Rule 1.15(b) to provide timely accountings upon request, and that he had engaged in dishonesty. Except as explained below, we agree with both of these conclusions.

Upon JSM's request, Midlen was required by Rule 1.15(b) to notify it of the receipt of royalty payments and to render a prompt accounting of any monies he had received.[10] Although Midlen received funds on behalf of JSM several times between May 1996 and December 1997, and though he promised no later than October 1996 to provide "an accounting for monies received and disbursed since May 1996," he furnished no accounting until April 23, 1998. As the Board concluded, "[t]his inexcusable one-and-a-half year

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10. Rule 1.15(b) states:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

delay in supplying the accounting was most certainly not the prompt accounting required by Rule 1.15(b)." Midlen resists that conclusion by arguing that the rule requires an accounting only with respect to funds that the client "is entitled to receive," and that, as any cable royalty distributions JSM received after the accounting was requested did not cover his unpaid legal fees, he had no duty to account for them. The Hearing Committee — in agreement with the Board on this point — correctly rejected that argument:

> The lawyer's duty *to account for the funds* exists independently of the lawyer's duty to *distribute the funds*. The Rule requires the lawyer to render a prompt accounting upon request from a client and does not condition the accounting on the client's right to receive the funds. Put another way, the client has the right to *know* what funds the lawyer holds on behalf of the client even where the client may not ultimately receive the funds. [(Emphasis in original.)]

Midlen may have doubted JSM's right to the funds or even the sincerity of its requests for information, but that did not excuse his failure to provide the timely accounting Rule 1.15(d) requires.[11]

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11. We reject Midlen's textual argument, employing the "rule of the last antecedent," that only funds the client ultimately "is entitled to receive" need be accounted for. That would condition the client's right to learn what claim he has to the funds on proving beforehand his entitlement to them — which assuredly is not what the rule contemplates.

Beyond the violation of that rule, the Board found — and we agree — that Midlen separately violated Rule 1.16(d) when, after JSM terminated his services in February 1998, he failed to deliver JSM's files to successor counsel and, once again, failed to furnish a prompt accounting. As the Board explained:

> On the day that [Midlen's] services were terminated, [attorney] Koszorus requested JSM's files. The record contains four subsequent written requests for transfer of the files. . . . We believe retaining client files for seven months after termination was patently unreasonable. . . . Indeed, we note [Midlen] did not return JSM's files until after he had notice of JSM's complaint to Bar Counsel. . . . [Moreover,] JSM [had] terminated [Midlen's] services because he failed to provide [an accounting]. . . . His delay in providing an accounting, or even the most rudimentary financial information, was unreasonable in light of the fact that it had been repeatedly requested both before and after his termination.

The Board concluded further that Midlen had engaged in dishonesty within the meaning of Rule 8.4(c). In part that conclusion rested on the finding that Midlen's misappropriation of disputed funds was reckless, *see Romansky*, 825 A.2d at 316-17 ("a showing of recklessness can sustain a violation of . . ." Rule [8.4(c)]; "[i]f Romansky violated the fee agreements . . . recklessly — *i.e.*, consciously disregarding the risk that the agreements did not permit

premium billing — then his conduct was dishonest"), a conclusion we have rejected. But the Board's finding of dishonesty rested on other conduct as well, which so far we have omitted from our summary of the evidence. This was conduct regarding an Addendum Midlen executed on JSM's behalf in 1997. The Board set forth the relevant facts and its reasons for concluding that Midlen's actions concerning the Addendum were dishonest. We agree with that conclusion and, in the following, adopt that portion of the Board's report, except to delete record citations and change "respondent" to "Midlen":

> In October of 1997, Midlen informed JSM that it was necessary to amend the Devotional Claimants' 1992-93 Settlement Agreement because one of the other claimants had failed to file a claim in the royalty proceeding. In a fax to JSM on November 12, Midlen reported on the status of this proceeding and attached a proposed draft Addendum. On November 14, JSM informed Midlen that it needed time to review the matter and that Midlen was not authorized to execute or sign any document on its behalf until JSM informed him of its decision. Midlen offered to answer any questions regarding the Addendum. He also reminded JSM that the Addendum did not make any substantive changes to the earlier agreement.
>
> Thereafter, JSM advised Midlen that Frank Koszorus would be contacting him regarding the Addendum and reminded him that "the directives

given to you in our letter of November 14, 1997, are still in effect." Midlen met with Koszorus, who indicated that he understood the Addendum and did not have any questions for Midlen. On December 12, Midlen forwarded the final version of the Addendum to JSM and advised it that the final version would go forward the following week. The same day, Reverend (Jimmy) Swaggart responded to this letter, advising Midlen that he could only execute the Addendum for JSM "when you have authorization in writing to do so from myself or Frances-not before." The next day, Midlen replied to this letter noting that Koszorus had not raised any objections to the Addendum and that JSM had not raised any specific problems or questions. Midlen's letter did not advise JSM that he intended to execute the Addendum over JSM's objection.

Midlen executed the Addendum on December 16, 1997. Shortly, thereafter, Midlen received a letter from Koszorus, dated December 16, reiterating JSM's directive that Midlen was not to execute the Addendum without written permission from JSM. Midlen neither replied to this letter nor took action to withdraw JSM's assent to the Addendum. JSM did not learn that Midlen had executed the Addendum until April 1998.

* * * * *

Appendix A

What is clear from the record is that at the time Midlen signed the Addendum his client had informed him on three separate occasions that he was not authorized to do so. Moreover, Midlen's actions after signing the Addendum were not consistent with the actions of a lawyer who honestly believed he had the authority to sign this document. Midlen did not tell his client that he had signed the Addendum. He did not send his client a copy of the signed Addendum. The day after the Addendum was signed, JSM wrote again and restated its objection. Midlen did not reply to this letter by telling his client that he had already executed the agreement. . . .

"[D]ishonesty," includes "conduct evincing 'a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.' " *In re Shorter*, 570 A.2d 760, 767-68 (D.C.1990) (*quoting Tucker v. Lower*, 200 Kan. 1, 434 P.2d 320, 324 (1967)). Only the most general of these types of misconduct — dishonesty — need be shown to establish a violation of Rule 8.4(c). *Id.* at 767. Dishonesty includes a failure to disclose a material fact when there is a duty to do so. *In re Reback*, 487 A.2d 235, 239-40 (D.C.), *vacated by*, 492 A.2d 267 (D.C.1985), *and aff'd in relevant part*, 513 A.2d 226 (D.C.1986) (en banc) (citation omitted).

Here, Midlen (i) executed the Addendum in direct contravention of his client's instructions; and (ii) failed to tell his client that he had taken

> this action, even though he had several opportunities to do so. . . . [T]his conduct evidences a lack of honesty, probity, and integrity, and th[u]s violated Rule 8.4(c).

V.

Accepting the Board's alternative recommendation, we suspend Midlen for eighteen months. He committed misappropriation by deducting attorney's fees from disputed funds entrusted to him; he thus "accorded a higher priority to the collection of his fee than to . . . complying with professional standards." *In re James*, 452 A.2d 163, 170 (D.C.1982). He compounded that misconduct by repeated instances of failure to provide a timely accounting, and by signing, and then not disclosing that he had signed, a document without the client's authorization — conduct evincing dishonesty under our decisions. The Board's recommendation is within the range of sanctions for combined ethical violations of this kind. *See, e.g., In re James, supra* (two-year suspension for violations including dishonesty, commingling, and conflict of interest); *In re Lopes*, 770 A.2d 561, 570 n. 5 (D.C.2001) (endorsing Board's understanding that sanctions for dishonesty range generally from thirty days to disbarment, and that "[w]hen the dishonesty is coupled with other violations, the sanction tends at least toward the middle of that range"). D.C. Bar R. XI, § 9(g) requires this court to "enforce a general sense of equality in the sanctions [administered], but it otherwise commands that we should respect the Board's sense of equity in these matters unless that exercise of judgment proves to be unreasonable." *In re Haupt*, 422 A.2d 768, 771 (D.C.1980). The Board's alternative recommendation satisfies that standard.

Appendix A

Accordingly, John H. Midlen, Jr., is hereby suspended from the practice of law in the District of Columbia for eighteen months.

So ordered.

APPENDIX B — ORDER OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC DATED MARCH 30, 2006

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 04-BG-808

IN RE: JOHN H. MIDLEN,

Respondent.

Bar Registration No. 36384

BDN: 165-98

BEFORE: Washington, Chief Judge; Schwelb, Farrell, Ruiz, Reid, Glickman, Kramer, and Fisher, Associate Judges.

ORDER

On consideration of respondent's petition for rehearing en banc, the opposition thereto, respondent's consent motion for leave to file petition in excess of ten pages, respondent's lodged petition for rehearing en banc, the motion for leave to file comments of amicus Arnold P. Lutzker, Esquire, in support of the petition for rehearing en banc, the lodged comments of amicus Arnold P. Lutzker, Esquire, Bar Counsel's opposition thereto, the reply comments of amicus Arnold P. Lutzker, Esquire, to Bar Counsel's opposition, and respondent's response to Bar Counsel's opposition, and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

Appendix B

ORDERED that respondent's motion for leave to file petition for rehearing en banc in excess of ten pages is granted and the Clerk is directed to file respondent's lodged petition for rehearing en banc. It is

FURTHER ORDERED that the motion for leave to file comments of amicus Arnold P. Lutzker, Esquire, in support of the petition for rehearing en banc is granted and the Clerk is directed to file the lodged comments of amicus Arnold P. Lutzker, Esquire. It is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM.